No. 10,526

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

AL C. FOX, COLLISON GILBRETH, R. E. SUTTON, ORVILLE HUTCHINS, JOHN S. JONES, NEPHI N. DUSTIN, MERRILL C. HUTCHINS, H. M. CHILDERS, WARREN S. MORDEN, EDWARD F. O'NEILL, PHILIP EDGAR FERRIS,

Appellants,

vs.

SUMMIT KING MINES, LIMITED (a corporation),

Appellee.

BRIEF FOR APPELLANTS.

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Appellants,

vs.

SUMMIT KING MINES, LIMITED (a corporation),

Appellee.

BRIEF FOR APPELLANTS.

STATEMENT AS TO PLEADINGS AND JURISDICTION.

This action was brought by the appellants in an action at law, in the United States District Court for the District of Nevada, to recover unpaid overtime wages, an additional equal amount as liquidated damages, a reasonable attorney's fee and costs, from the appellee, under the "Fair Labor Standards Act of 1938", 52 Statutes 1060; Title 29, U. S. C. A., Chapter 8, Sections 202, 203, 207, 216.

This is a class action wherein the appellants assert a right arising out of a series of transactions where

questions of law and fact common to all are involved and a common relief is sought and which was brought in accordance with subdivision (3) of Rule 23 of the Rules of Civil Procedure, for the District Courts of the United States, and alleged in paragraph I of appellants' Amended Bill of Complaint Rec. 2).

Jurisdiction of the District Court is conferred by Section 41 (8) 28 U. S. C. A. 24 (Judicial Code), (36 Statutes 1092, 38 Statutes 219) and alleged in paragraph II of appellants' Amended Bill of Complaint (Rec. 3).

The judgment entered by the United States District Court for the District of Nevada, is a final decision of said Court, and appellate jurisdiction is conferred on the above entitled Court by Section 128 (a) of the Judicial Code, as amended February 13, 1925, effective May 13, 1925 (43 Statutes 936; 28 U. S. C. A. Section 225(a), First, and 225(d).

Appellants allege in their Amended Bill of Complaint (Rec. 3), that the defendant corporation is organized and existing under and by virtue of the laws of the State of Nevada and engaged in operating a mine in Churchill County, Nevada, producing gold and silver ores and reducing the same to bullion and which ores and bullion were produced for transportation in interstate commerce and were so transported from Churchill County, Nevada, to the United States Mint at San Francisco, California, and there sold to the United States Government.

That the appellants were employed by the appellee at various times in the operation of its mill at

Churchill County, Nevada, which reduced the ore mined to precipitates and which is melted into gold and silver bullion and shipped and sold to the Mint.

That all of the appellants were employed subsequent to the enactment to the "Fair Labor Standards Act of 1938" (Chapter 8, Title 29, U. S. C. A. 201-219) and allege (Rec. 4) that they were employed for various periods of time between January 1940, and April 1, 1942, in appellee's mill or reduction works.

The appellants allege (Rec. 4) that they rendered services to the appellee for eight hours every day of their employment and were responsible to the appellee for the proper and careful operations of the machinery and equipment and for the flow, thickening, separation, sampling, and other processes of the ore through the mill for each eight hour shift, but received compensation therefor for only seven hours; that appellants also allege that each hour that they were employed over seven hours and for which they were not compensated was in excess of the maximum hours in each work week required by Section 207 of the "Fair Labor Standards Act of 1938", U. S. C. A. Title 29, and in violation of said Section 207.

That it is alleged in paragraph VI of the Amended Bill of Complaint (Rec. 5) that on or about the 22nd day of April, 1941, a controversy arose between the appellants and management relative to an increase in wages and the management agreed that the mill men would get an increase of twenty-five cents per day and thereafter the solution men were paid time and one-half for eleven minutes and the ball mill men

time and one-half for twelve minutes amounting to twenty-five cents per day respectively and in addition to their compensation received for seven hours; it was further alleged in said paragraph VI that the solution men have not been compensated for forty-nine minutes and the ball-mill men for forty-eight minutes for each day appellants were in the employ of the appellee from and after the 23rd day of April, 1941, until the termination of their employment and said increase in wages did not alter the previous working routine or time in any way and appellants continued at their employment for eight hours per day and sixty minutes during each hour and until their employment was terminated.

Appellants in paragraph VII of their Amended Bill of Complaint (Rec. 6-11) set forth an estimated itemized statement of their periods of employment, number of days employed and rate of wages per day, rate of wages per hour at time and one-half and total amount of compensation earned by each appellant and unpaid by the appellee, and amounts claimed as liquidated damages.

Appellee, by its answer (Rec. 12) denies all and specifically paragraph I, pertaining to the right of appellants to bring a class action under the Rules of Civil Procedure for United States District Courts and as conferred by the "Fair Labor Standards Act of 1938"; appellee also denies all and specifically the allegations of paragraph II of the Amended Bill of Complaint pertaining to the jurisdiction of the United States District Courts under the Judicial Code; ap-

pellee admits the allegations of paragraph III of the Amended Bill of Complaint relative to appellee being a Nevada corporation, but denies that the mining and milling of gold and silver ores and reduction of same in the State of Nevada was for transportation in interstate commerce and that said ores or minerals, or mineral products processed or reduced by appellee have been transported in interstate commerce, or sold or offered for transportation, or transported, or shipped, or delivered in interstate commerce from any part of the State of Nevada to San Francisco, California, or any other place outside of the State of Nevada; appellee denies each and every allegation of paragraph IV of said Amended Bill of Complaint pertaining to the production of gold and silver ores and reducing same to precipitates or bullion for interstate commerce, but admits that it employed said appellants for various periods of time in its mill or reduction works in the reduction of gold and silver ores; appellee denies all and singular the allegations contained in paragraph V of the Amended Bill of Complaint which alleges generally that all of the appellants were employed by the appellee and rendered services as solution men and ball-mill men in appellee's mill in Churchill County, Nevada, for a period of eight hours during each and every day that the appellants were employed and that the appellants were required to give their entire time, knowledge and experience to their work and were responsible to the appellee for the proper and careful operation of the machinery and equipment and the processes through

which the ores passed through the mill and that appellee paid a daily wage for only seven hours for each day and that the appellants rendered their time and services for one hour during each day without any compensation therefor except as modified in a subsequent paragraph (VI) and that each hour which appellants claimed to have worked without compensation was in excess of the maximum hours required by Section 207 of the "Fair Labor Standards Act of 1938" and that the appellants should be compensated for such hours or as subsequently modified after the agreement of April 22, 1941, at one and one-half times the regular rate at which appellants were employed; appellee admits all of the allegations of paragraph VI of said Amended Bill of Complaint pertaining to the controversy between the management and employees relative to a proposed increase in wages and that the agreement of April 22, 1941, provided for the solution man to be paid time and one-half for eleven minutes and the ball-mill men time and one-half for twelve minutes, but appellee denies that the solution men have not been compensated for 49 minutes and the ball-mill men for 48 minutes for each day appellants were in the employ of the appellee as solution men and ball-mill men from and after the 23rd day of April, 1941, and appellee also denies that said increase in wages did not alter the previous working routine in any way and that the appellants continued at their employment for eight hours per day and sixty minutes during each hour until termination of employment.

Appellee admits that the appellants were employed by the appellee at various rates of wages per day, but denies all of the other allegations of paragraph VII of the Amended Bill of Complaint, which paragraph contains an itemized statement of the names of appellants, periods of time employed, number of days employed during each period and rate of wages per day, rate of wages per hour at time and one-half, total amounts claimed by each appellant and a summarized statement of total unpaid overtime, liquidated damages, and which itemized statements are alleged to the best of appellants' knowledge and belief.

Appellee also alleges two affirmative defenses, to wit: that said Amended Bill of Complaint fails to state a claim upon which relief can be granted; and that the District Court is without jurisdiction of the subject matter of the action.

No reply was filed.

After the answer was filed, it was stipulated (Rec. 14) by counsel for the respective parties that appellants may file an Amended Bill of Complaint and that the Answer theretofore filed may be considered as appellee's answer to the Amended Bill of Complaint.

It was also stipulated (Rec. 15) before trial, that the appellee produced gold and silver ores in Churchill County, Nevada, and there reduced to bullion and transported by United States Mail in interstate commerce from Churchill County, Nevada, to San Francisco, California, and sold to the United States Mint.

It was further stipulated that the computations of the periods of time, number of days, rate of wages per day, was for seven hours, and rate of wages per hour was at the rate of seven hours per day with time and one-half for overtime and the total amount of compensation claimed to have been earned and unpaid as stated on pages 5, 6 and 7 of the Amended Bill of Complaint (Rec. 7-11) are correct in accordance with appellants' theory and need not be proven. It was also stipulated that the testimony of the appellants not present at the trial would be the same as those testifying as to the character of the work, mill routine, policy of management, making time and work reports and other evidence pertaining to their employment and that their testimony would substantiate the itemized statements set forth in the Amended Bill of Complaint.

The District Court which had tried the case without a jury, on the 27th day of January, 1943, filed its Opinion and Decision (Rec. 16) wherein the issues and evidence were reviewed and the Court held appellee was not engaged in interstate commerce and not subject to the provisions of the "Fair Labor Standards Act of 1938" and that the action should be dismissed and it was so ordered.

Appellants duly filed a Motion for a New Trial or Re-Hearing (Rec. 23) which was heard by the Court and after consideration (Rec. 26) held, that it was still the conclusion of the Court that the District Court was without jurisdiction, and also, that

appellants have failed to establish that they performed any substantial amount of labor during the lunch hour over and above that for which they had been compensated and that the motion for a new trial be dismissed.

That Findings of Fact and Conclusions of Law (Rec. 27) were duly filed and Judgment (Rec. 31) was entered on March 16, 1943.

Appellants filed Notice of Appeal (Rec. 32) and Bond for Costs on Appeal (Rec. 33) on May 27, 1943, and that on the 23rd day of June, 1943, the District Court made its Order (Rec. 35) to transmit the original transcript of evidence and original exhibits to the Circuit Court of Appeals and also made an Order (Rec. 37) extending time for filing record and docketing appeal to and including the 25th day of August, 1943; that on the 23rd day of June, 1943, counsel for the respective parties made and filed a stipulation (Rec. 38) designating portions of the record, proceedings and evidence to be contained in the Record on Appeal.

Thus, the appeal has been perfected in accordance with the Federal Rules of Civil Procedure; and this Court has jurisdiction of said appeal under Section 128 of the Judicial Code—U. S. C. A. Title 28, Sections 225(a), First, and 225(d).

STATEMENT OF CASE.

This action was brought by eleven employees (appellants) against the Summit King Mines, Limited, a Nevada corporation, their employer, under the "Fair Labor Standards Act of 1938" (Chapter 8, Title 29, U. S. C. A. 201-219, 52 Statutes 1060), to recover unpaid compensation which they allege to have earned and which was unpaid by the defendant corporation.

The appellants were employed in the operation of a quartz mill at appellee's mine in Churchill County, Nevada; appellee was producing from the mine gold and silver bearing ore on the same property upon which the mill was situated. The ore was brought into the mill and there ground to a fine mash and then passed through ball mills, classifiers, and the pulp went through a thickener and passed into agitators, washing thickener and into the precipitation system; the ore or pulp was kept in continuous motion throughout the entire process and by the use of cyanide the values were extracted from the ore into a solution and taken up by zinc dust and run through a press and the precipitates are taken out from time to time and melted into bullion and which was shipped by United States Mail to the Mint at San Francisco, California. The mill is operated by two diesel engines and runs continuously twenty-four hours a day and it requires approximately seventy-two hours from the time the ore enters the mill until the values are recovered.

The twenty-four hour day is divided into three shifts commencing with the day shift at 7 o'clock a. m. and ending at 3 o'clock p. m., the afternoon shift from 3 p. m. to 11 p. m., and the graveyard shift from 11 p. m. to 7 a. m. the following morning. Two men are employed on each shift in the operation of the mill, one of whom is called the ball-mill man who looks after the tonnage classifiers and ball-mill and is required to take samples from the overflow hourly to ascertain the values and for grind and to weigh the solution for tonnage and to add cyanide or lime from time to time as the samples indicate are required. The duties of the solution man is to look after the solution end of the mill, to take samples, weigh the pulp at different places for gravity, and to take care of the precipitation and to see that the solution in the tanks is kept at the right levels and to watch the diesel engines.

The solution man is recognized as being in charge of the entire mill and the superior of the ball-mill man.

The mill men made out their own time cards which were signed by the solution man and turned into the office of the mill superintendent. The work reports were filled out and turned in by each man for an eight hour shift and which showed a record of the sampling and testing for each hour during the eight hour shift.

The mill started operations on January 5, 1940, when the forty-two hour work week, under the "Fair Labor Standards Act of 1938" was in effect, and the

appellants worked at various times under the forty-two hour work week and the forty hour work week and which periods of employment are more particularly itemized in appellants' Amended Bill of Complaint (Rec. 7-11).

On the 29th day of December, 1939, and prior to the commencement of operations of the mill, a notice to the mill employees was posted in the mill which is designated defendant's Exhibit B (Rec. 67) in evidence and which notice was to the effect that the men should work seven hour shifts relieving each other one hour for lunch, the ball-mill operator to relieve the solution operator from 11 o'clock to 12 o'clock and the solution man to relieve the ball-mill man from 12 o'clock to 1 o'clock and which we assume was for the day shift but no instructions were contained in said notice relative to the lunch period on the afternoon or graveyard shifts and which notice remained posted until April 22, 1941, when a different wage scale went into effect after a controversy between the management and the employees of the mine and mill.

On April 23, 1941, another notice was posted entitled "Notice to Mill Employees on Daily Wage Basis" (Rec. 64) stating in substance and effect that in order to comply with the agreement reached April 22, 1941, whereby overtime arrangements were to be made to enable employees to earn $1.50 more per week, instructions were that the solution man's shift including the lunch period will be eight hours as it always has been. Instead of taking one hour for lunch the solution man will take forty-nine minutes, that the

solution man should mark his time card, daily rate $6.35 but for overtime worked put seven hours plus eleven minutes overtime and which would result in an increase of $1.50 per week. The ball-mill men were instructed that their shift including the lunch hour will be eight hours as it always has been but instead of taking one hour for lunch you will take forty-eight minutes and to mark the time card, daily rate $5.85, time worked seven hours plus twelve minutes overtime which would result in earning $1.50 more per week. There is no designation in this last notice as to one man relieving the other for lunch nor did it designate any particular time for a lunch period.

The notice to mill employees on daily wage basis, appellee's Exhibit A (Rec. 64) was posted after a controversy between a committee of the miners and the mill men and the manager of the corporation. The mill men had one representative on the committee, H. M. Childers, who is one of the appellants and who testified in the District Court.

It is the contention of the appellants that they were employed for a full shift of eight hours and that any time taken by them in the eating of their lunches was in the period of their employment and while they were in attendance at their work and were required to take samples and were responsible for the proper performance of their services and the continuous operation of the mill during every hour of the eight hour shift and that the management permitted or acquiesced in and accepted such services during each hour of the eight

hour shift and the employees were required to make a report for each hour of the shift.

The appellee contends that the appellants were allowed one hour for lunch and consequently were only employed for a seven hour shift and only entitled to compensation on a basis of seven hours.

Counsel for the appellants and for the appellee filed a stipulation (Rec. 15) before trial, stipulating in substance and effect that the gold and silver ores produced by the appellee corporation were reduced to bullion and transported by United States Mail from Churchill County, Nevada, to San Francisco, California, in interstate commerce and which was there sold to the United States Mint and it was also stipulated that the computations of the period of time, number of days, rate of wages per day was for seven hours and rate of wages per hour was at the rate of seven hours per day with time and one-half for overtime and the total amount of compensation claimed to have been earned and unpaid as stated on pages 5, 6 and 7 of the appellants' Amended Bill of Complaint are correct in accordance with the appellants' theory of the case and need not be proven; and also that the testimony of the appellants not present at the trial would be practically the same as the appellants testifying, as to the same character of work, mill routine, policy of the management, making time and work reports, and other evidence of a general nature pertinent to their employment and that the appellants not present would also testify as to the number of days they were employed, the rate per day, and the rate per hour at time

and one-half overtime and the total amount claimed to be unpaid would be the same as itemized for each appellant respectively on pages 5, 6 and 7 of appellants' Amended Bill of Complaint (Rec. 7-11).

The cause went to trial before Judge F. H. Norcross without a jury and after hearing the testimony of three witnesses for the appellants and two for the appellee and documentary evidence, the Court ordered that the matter be submitted on briefs; counsel for the respective parties submitted their briefs and after consideration by the trial Court the Court, on the 27th day of January, 1943, entered its opinion and decision (Rec. 16) wherein the Court reviewed the evidence and the law applicable thereto and that it was the conclusion of the Court that the action should be dismissed and it was so ordered.

Counsel for appellants thereafter and in due time filed a motion for a new trial (Rec. 23) or rehearing and which motion was heard by the Court; that said motion was ordered submitted and subsequently Judge Norcross entered a written decision and order (Rec. 26) denying the motion for a new trial, affirming his former decision that the District Court was without jurisdiction notwithstanding the decision in the case of *Canyon Corporation v. National Labor Relations Board,* 128 Fed. (2d) 953, by reason of the fact that the Board had for consideration not only shipments of gold and silver to a United States Mint as part of its milling operations, but also, shipped slag therefrom and sold the same to a smelting company in another state; and also, it was the conclusion of the Court

that the appellants failed to establish that they performed any substantial amount of labor during the lunch hour over and above that for which they received pay for overtime.

The Findings of Fact and Conclusions of Law (Rec. 27) and Judgment (Rec. 31) of the Court were duly filed on the 16th day of March, 1943; that the appellants in the Court below duly filed notice of appeal (Rec. 32) and filed a statutory bond (Rec. 33) as security for costs and the appeal was duly presented to the Circuit Court of Appeals for the Ninth Circuit.

THE QUESTIONS INVOLVED.

The questions involved in this cause, and the manner in which they are raised, are as follows:

I.

(a) Was the appellee corporation by mining ore and operating a mill in Churchill County, Nevada, and reducing gold and silver ores to bullion for transfer and sale to a United States Mint at San Francisco, California, engaged in producing goods for interstate commerce within the coverage of the "Fair Labor Standards Act of 1938"?

(b) Was the transportation of gold and silver bullion by United States Mail from Churchill County, Nevada, to the United States Mint at San Francisco, California, and there sold to the United States Government, goods transported in interstate commerce

within the meaning of the "Fair Labor Standards Act of 1938"?

The foregoing questions are raised by the pleadings, stipulation of counsel reducing issues and evidence, and appellants' specification of errors.

II.

Were the appellants within the employ of the appellee for eight hours per day, within the definition of the term "employ" as defined by Subdivision (G), Section 203 of the "Fair Labor Standards Act of 1938", Title 29 U. S. C. A., page 448 (52 Statutes 1060), notwithstanding a notice posted by the appellee that the men will work seven hours during each shift, relieving each other one hour for lunch prior to April 23, 1941, and were paid for seven hours work and on April 23, 1941, another notice was posted to the effect that thereafter solution men will take 49 minutes and ball-mill men 48 minutes for lunch and that time cards should be filled out and were filled out accordingly; that the solution men were paid for seven hours plus time and one-half for eleven minutes and the ball-mill men were paid for seven hours plus time and one-half for twelve minutes, although solution men and ball-mill men filled out work reports for eight consecutive hours and were in and about the mill and places of employment during eight consecutive hours of each shift, taking less than the time designated for lunch by the appellee and listening, observing and attending machinery, equipment, and cyanide processes whenever necessary and being

present for the purpose of fulfilling their responsibilities for the continuous and satisfactory operation of the mill and protecting themselves, co-employees, structure, machinery and equipment from injury and damage, and were the appellants fully compensated for each work day that they were in attendance at their places of employment in appellee's mill during each eight hour shift?

The foregoing question is being raised by the pleadings, stipulation of counsel reducing the issues and evidence, and appellants' specification of errors.

SPECIFICATIONS OF ERRORS.

1.

The trial court erred in its finding of fact (No. IV, Rec. 28), that none of the appellants during his period of employment by the appellee was engaged in commerce or in the production of goods for commerce.

This finding is erroneous for the reason that exclusion from interstate commerce does not depend on the commercial nature of the article, or the existence of competitors; that the Post Office transporting gold and silver to the United States Mint in another state was not the agent of the mint and the gold and silver did not become the property of the government until it had arrived, was receipted for, inspected, and paid for; the term "goods" as used in the "Fair Labor

Standards Act of 1938" regulating wages and hours of employees engaged in producing goods for commerce, includes mining of gold and silver and shipping and selling the same to a mint in another state, since, under the Gold Reserve Act, gold may be used for industrial, professional and artistic purposes; silver may be purchased as a commodity from the producer or from the government.

2.

The trial court erred in its finding of fact (No. V, Rec. 29) that each of the appellants performed work, labor and services in appellee's mill for a period of seven hours during the particular shift upon which he was working and that each of the appellants was free from duty for a period of one hour during each shift for the purpose of eating his lunch.

This finding is erroneous for the reason that the term "employ" as defined by the "Fair Labor Standards Act of 1938" includes to suffer or permit to work; that notwithstanding notices posted by the employer in the mill, that ball-mill men and solution men should take one hour for lunch and one of the two men on a shift should relieve the other during his lunch period, and the employees turned in a time card for seven hours for each shift, nevertheless it was the practice of the men to eat their lunches without relief and within sight and hearing of the processes of the mill under their charge without neglecting their work and for which they were responsible and each employee turned in a work report for

each hour of an eight hour shift and which reports were accepted by the employer together with the time and services so rendered including the benefits to the appellee of the presence of each employee as a safety precaution. That the notices instructing the men to take one hour for lunch and one man to relieve the other for lunch only applied to the day shift and no lunch period was designated or provided for, within the afternoon or graveyard shift of eight hours each, and which latter shifts require the same work, services and responsibility; that the employees were not free from duty for a period of one hour during each shift and were available for mishap, accidents, and responsible for the efficient flow of pulp and operation of the machinery. That the place of employment was about 30 miles from the homes of the employees and they could not use an hour's time during a shift even if they had that time and were inclined to do so.

3.

The trial court erred in its finding of fact (No. V, Rec. 29) that each of said appellants was paid in full by appellee at the rate of wages established by agreement between appellants and appellee, which was in excess of that required by the "Fair Labor Standards Act of 1938".

This finding is erroneous for the reason that if there was an express or implied agreement that the appellants should work seven hours per shift and were paid for seven hours and the appellee posted

notices to that effect, but suffered or permitted the appellants to render services for eight hours without compensation for one hour of the eight hour shift that such an agreement was in violation of the spirit and policy of the Act.

4.

The trial court erred in its finding of fact (No. V, Rec. 29) that each of said appellants was paid overtime at the rate of one and one-half times the amount of the agreed wage for all hours worked in excess of forty-two hours a week during the period of employment from January, 1940, to October, 1940, and forty hours from October, 1940, to the termination of the employment of each of the appellants and that each of said appellants was paid overtime at the rate of one and one-half times the agreed wage for all hours worked in excess of forty hours per week.

This finding is erroneous for the reason that each of the appellants was in the employ of the appellee as the term "employ" is used in the "Fair Labor Standards Act of 1938" for one hour for which he was not paid from the time of commencement of employment until April 23, 1942, and the ball-mill men were not compensated for 48 minutes and the solution men for 49 minutes for each shift, from April 23, 1942, until the termination of employment, and that the appellants are entitled to time and one-half for each hour or fraction of an hour that they were in the employ of appellee and for which they were not compensated.

5.

The trial court erred in its finding of fact (No. VI, Rec. 29) that none of the said appellants made any claim for overtime other than that paid by appellee during the period of his employment by appellee and that none of said appellants made any claim for the payment of overtime until the making of demand upon appellee prior to the filing of the action in the present case.

This finding is erroneous for the reason that there is evidence by one of the appellants who was one of the committee representing the mill men which met with the management on April 22, 1941, and who testified that the question of the mill men working eight hours and also the "Fair Labor Standards Act of 1938" was discussed with Mr. Dobson, the manager for the appellee, and while said testimony was slight, no witness for the appellee contradicted such testimony, nor extended, explained or enlightened the court in respect to such testimony. Even if the appellants did not make any claim for the payment of overtime other than what was paid by appellee until prior to the filing of an action in court, such demand was not necessary or required and the appellants could not waive, relinquish, or acquiesce in any agreement or arrangement whereby non-payment of wages for any hours or fraction thereof worked in excess of the maximum number of hours per work week without compensation at the rate of time and

one-half and the appellee could not even in the absence of such a demand withhold such payment of overtime compensation, nor evade, avoid, condone, or take advantage of the employees' failure to make such a demand.

6.

The trial court erred in its finding of fact (No. VII, Rec. 29) that none of the appellants performed any work or labor for appellee during the lunch period or at any other time for which he did not receive pay for overtime at one and one-half times the agreed wage.

This finding is erroneous for the same reason as stated for specifications Nos. 2 and 4.

7.

The trial court erred in its finding of fact (No. VIII, Rec. 30) that the allegations of paragraph IV of appellants' Amended Bill of Complaint are not true; said allegations being in substance and effect, that the appellee employed the appellants in the production of gold and silver ores and reducing the same to precipitates or bullion for interstate commerce and that substantially all of said gold and silver ores, precipitates, and bullion have been produced for interstate commerce and sold, offered for transportation, transported, shipped and delivered in interstate commerce.

This finding is erroneous for the same reason as stated for specification 1.

8.

The trial court erred in its finding of fact (No. VIII, Rec. 30) that the allegations contained in paragraph V of the Amended Bill of Complaint are not true; said allegations being in substance and effect that the appellants rendered services and were required to give their entire time, knowledge and experience to their work and were responsible to the appellee for the proper and careful operation of the machinery and equipment, and for the flow, thickening, separation, sampling and other processes of the ore through the mill for a period of eight hours during each and every day and that said appellants were paid for only seven hours and accordingly each appellant gave his time and services for one hour each day (as modified in paragraph VI) (Rec. 5) without compensation and which hours were in excess of the maximum hours in such work week required by Section 207 of the Act and in violation of said Section 207.

This finding of the trial court is erroneous for the same reason stated for specification 2.

9.

The trial court erred in its finding of fact (No. VIII, Rec. 30) that the allegation contained in paragraph VII of said Amended Bill of Complaint are not true; said allegations being an itemized statement of the period of time each appellant was employed, number of days employed during each period and

rate of wages per day, rate of wages per hour at time and one-half, and total amount claimed due each appellant and which statement was stipulated by counsel for the respective parties to be correct in accordance with appellants' theory of the case.

In the event the findings of the trial court as stated in the foregoing assignments are erroneous, then the finding that the allegations of paragraph VII of said Amended Bill of Complaint are not true would be erroneous for the reason that counsel for the respective parties stipulated that the itemized statements set forth in said paragraph VII (Rec. 6-11) are correct in accordance with appellants' theory of the case.

10.

The trial court erred in making its conclusion of law No. 1 (Rec. 30) that there has been no violation of Sections 6 or 7 of the "Fair Labor Standards Act of 1938", being Title 29 U. S. C. A. Sections 206 and 207, by the appellee.

Conclusion of law No. I, is erroneous for the reasons stated in specification No. 1.

11.

The court erred in its conclusion of law No. II (Rec. 30) that appellants are not entitled to the relief asked for in their Amended Bill of Complaint and that appellee is entitled to judgment herein.

Conclusion of law No. II is erroneous for all of the reasons hereinabove stated.

12.

The trial court erred in its conclusion of law No. III (Rec. 30), that appellee is entitled to recover from appellants its costs incurred in the sum of $137.68.

Conclusion of law No. III is erroneous for all of the reasons hereinabove stated.

13.

The trial court erred in entering its judgment (Rec. 31) that appellants take nothing by their complaint and that appellee have and recover from the appellants the costs expended in the sum of $137.68.

The judgment entered by the court is erroneous for the reason it is contrary to the law and evidence.

ARGUMENT.

SUMMARY OF ARGUMENT.

Appellants have thirteen specifications of errors covering most of the findings, conclusions of law, and judgment of the trial court but for convenience and brevity of the argument, the specifications may be grouped under five separate parts, as follows:

(1) Specifications 1 and 7 cover the findings of the trial court pertaining to the question of the appellants and appellee being engaged in commerce and in the production of goods for commerce during the times that the appellants were in the employ of the appellee.

(2) Specifications 2, 6, 8, and 11 cover the lunch hour period in regard as to whether or not the appellants performed work, labor and services in the appellee's mill for eight hours per shift and for which they only received compensation for seven hours and that the duties and responsibilities of the appellants were the same for the entire eight hours of each shift and in particular for the time that the appellants ate their lunches.

(3) Specifications 3, 4 and 9 relate to the question as to whether or not the appellants were paid in full by the appellee at a rate of wages established by agreement and which rate was one and one-half times the amount of the agreed wage for all hours worked in excess of the maximum number of hours per work week provided for under the "Fair Labor Standards Act of 1938" and that the itemized statement of the appellants alleged in paragraph VII of the Amended Bill of Complaint (Rec. 6) is correct in accordance with the stipulation of counsel for the respective parties covering the employment of each of the appellants.

(4) Specification 5 relates to the question as to whether or not the failure of the appellants to make any claim for overtime other than what was paid by the appellee during the period of employment of appellants until just prior to the filing of the action was an admission by the appellants that they were fully compensated for the full period of their employment and a waiver or relinquishment of any compensation earned by the appellants and unpaid by the appellee

in accordance with the provision of the "Fair Labor Standards Act of 1938."

(5) Specifications 10, 11, 12, and 13 relate to the conclusions of law of the trial court in holding that there were no violations of Section 6 or 7 of the "Fair Labor Standards Act of 1938", being Title 29, U. S. C. A., Section 206-207, by the appellee, and that the appellants are not entitled to any relief asked for in their Amended Bill of Complaint and that the appellee is entitled to judgment together with the appellee's costs.

The appellee, Summit King Mines, Ltd., is a mining corporation engaged in operating a gold and silver mine in Churchill County, Nevada, and operates a mill upon the mining property and reduces the ores by the cyanide process and the gold and silver bullion is shipped and sold to the United States Mint at San Francisco, California; that said mill operated continuously for twenty-four hours per day and all of the appellants were employed in the operation of said mill and their duties and responsibilities were in general to keep the ore and pulp flowing through the mill by the continuous operation of the machinery and equipment and taking samples and other duties of a routine nature.

There is considerable distinction between the employment of men engaged in performing work and services in a mill or plant operating continuously, than there is in mining, construction, manufacturing and other industries, for the reason that such a mill as was operated by the appellee for twenty-four hours

per day must be kept running continuously, as it would not be practical or economical to arrange for the employment of the operators of the mill except by dividing the twenty-four hour day into three shifts and which would require the attendance of the employees during the entire period of eight hours without arranging the time so that the employees might have a definite period apart from their work and responsibilities for lunch, while on the other hand, in mining, construction, manufacturing and other industries which are generally not operated continuously during twenty-four hours per day, the employer may arrange the time so that the men will have a period for work, and a period for lunch can be set aside during which the men can be relieved of their duties and responsibilities without loss of time or of benefits to the employer. We believe that the application of the "Fair Labor Standards Act of 1938" to the employment of the appellants by the appellee under the definition of the term "employ" meaning to "suffer or permit to work", covers the employment of the appellants for each and every hour of an eight hour shift, regardless of whether their work was manual or consisted of being present upon the premises of the appellee and assuming the responsibilities for each hour from commencing work until relieved at the end of a shift.

Such portions of the "Fair Labor Standards Act of 1938" as, we believe, are applicable to the case at bar reads as follows:

FAIR LABOR STANDARDS ACT OF 1938.

We will only cite such portions of the "Fair Labor Standards Act of 1938" as may be applicable to the case at bar.

Section 201. Short title.

Sections 201-219 of this title (29 U. S. C. A.) may be cited as the "Fair Labor Standards Act of 1938". June 25, 1938, c. 676, Sec. 1, 52 Stat. 1060.

Section 202. Congressional finding and declaration of policy.

(a) "The Congress hereby finds that the existence in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintainance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several states; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

(b) It is hereby declared to be the policy of Sections 201-219 of this title, through the exercise by Congress of its power to regulate commerce among the several states, to correct and as rapidly as practicable to eliminate the con-

ditions above referred to in such industries without substantially curtailing employment or earning power." June 25, 1938, c. 676, Sec. 2, 52 Stat. 1060.

Sec. 203. Definitions.

As used in Sections 201-219 of this title:

"(b) 'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof."

"(g) 'Employ' includes to suffer or permit to work."

"(i) 'Goods' means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof."

"(j) 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State."

Sec. 207. Maximum hours.

"(a) 'No employer shall, except as otherwise provided in this section, employ any of his em-

ployees who is engaged in commerce or in the production of goods for commerce:

"(1) For a work week longer than forty-four hours during the first year from the effective date of this section;

(2) For a work week longer than forty-two hours during the second year from such date, or

(3) For a work week longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified, at a rate not less than one and one-half times the regular rate at which he is employed.'' ''

Section 216. Subdivision (B) reads as follows:

"Any employer who violates the provisions of Sec. 206 or Sec. 207 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.'' June 25, 1938, c. 676, Sec. 16, 52 Chap. 1069.

When the mill started operating in January, 1940, the maximum weekly hours provided for in the Act were forty-two hours and which continued until October 24, 1940; that from and after October 24, 1940, the maximum number of weekly hours provided in the Act were forty hours.

> "Section 203, Subdivision (G) defines the term 'employ' as follows. (G) 'Employ' includes to suffer or permit to work."

We believe the term in Section 203, Subdivision (G) "to suffer or permit" excludes the rules of law applicable to contracts for work and service and which the trial Judge evidently had in mind when deciding the case. To suffer or permit would imply the acceptance of the time, services, and attention to their duties, of the employees and the obligation on the part of the employer to compensate them for the same.

Congress must have intended to draw that distinction to avoid any attempt on the part of the employer and employees to resort to any evasion or subterfuge in the enforcement of the Act.

1.

APPELLANTS DURING THEIR EMPLOYMENT BY APPELLEE WERE ENGAGED IN THE PRODUCTION OF GOODS FOR COMMERCE AND WHICH WERE TRANSPORTED IN INTERSTATE COMMERCE.

Counsel for the respective parties stipulated before trial (Rec. 15) that the appellee produced gold and

silver ores in Churchill County, Nevada, and which were there reduced to bullion and shipped by United States Mail to the United States Mint at San Francisco, California, where it was sold by the appellee.

The Circuit Court of Appeals, Fourth Circuit, in the recent case of *Walling Adm'r of Wage and Hour Division, United States Department of Labor v. Haile Gold Mines, Inc.* (36 Fed. (2d) 102), May 28, 1943, held:

> "The term 'goods', as used in the Fair Labor Standards Act regulating wages and hours of employees engaged in producing goods for commerce, includes gold mined for the government and shipped to a mint in another state, since, under the Gold Reserve Act, gold may be used for industrial, professional, and artistic purposes." Fair Labor Standards Act of 1938, 29 U.S.C.A. Sec. 203(i); Gold Reserve Act of 1934, Sec. 3, 31 U.S.C.A. Sec. 442, 1942 Cumulative Annual Pocket Part.
>
> "Where the Post Office transporting gold to the United States Mint in another state was not the agent of the mint and the gold did not become the property of the government until it had arrived, was receipted for, inspected, and paid for, the business conducted by mine operator constituted 'interstate commerce' within the 'Fair Labor Standards Act' and was not a mere administrative act of the government, even though such shipments were pursuant to orders of the government." Fair Labor Standards Act of 1938, Sec. 203, 29 U.S.C.A. Sec. 203(b,i,j,); Gold Reserve Act of 1934, Sec. 3, 31 U.S.C.A. Sec. 442.

"The Fair Labor Standards Act was applicable to employees engaged in mining gold for the government even though there was no competitive market for gold in interstate commerce, since the power of exclusion from interstate commerce does not depend on the commercial nature of the article or the existence of competition." Fair Labor Standards Act of 1938, 29 U.S.C.A. Sec. 203(b,i,j); Gold Reserve Act of 1934, Sec. 3, 31 U.S.C.A. Sec. 442; U.S.C.A. Const. Amends. 5, 10.

The Circuit Court of Appeals, Eighth Circuit, on June 30, 1942, in the case of *Canyon Corporation v. National Labor Relations Board,* 128 Fed. (2d) 953, also held that gold produced and shipped from one state to another and sold to the United States Mint in "commerce" and "affected commerce" within the National Labor Relations Act. The syllabus of said case reads as follows:

"The production and shipment of gold bullion by a mine and refinery in one state for purpose of selling it to a United States Mint in another state is 'commerce' within the National Labor Relations Act, even though the United States may be the only customer to which bullion can be legally sold." National Labor Relations Act, Sec. 2 (6), 29 U.S.C.A. Sec. 152 (6); Gold Reserve Act of 1934, Sec. 1 et seq., Sec. 3, 31 U.S.C.A. Sec. 440 et seq., Sec. 442.

"That part of Sec. 3 of the Gold Reserve Act, 31 U.S.C.A. Sec. 442, 1942 Cumulative Annual Pocket Part page 67, reads in part as follows: 'The Secretary of the Treasury shall, by regulations issued hereunder, with the approval of

> the President, prescribe the condition under which gold may be acquired and held, transported, melted or treated, imported, exported, or earmarked: (a) for industrial, professional, and artistic use: * * *''

The Secretary of the Treasury with the approval of the President, has practically the same authority for the sale of silver at home and abroad. Sec. 734b, Title 31 U.S.C.A., page 117, 1942 Cumulative Annual Pocket Part, reads as follows:

> ''Whenever and so long as the market price of silver exceeds its monetary value or the monetary value of the stocks of silver is greater than 25 per centum of the monetary value of the stocks of gold and silver, the Secretary of the Treasury may, with the approval of the President and subject to the provisions of section 405a of this title, sell any silver acquired under the authority of sections 311a, 316a, 316b, 405a, 448-448e, 734a, and 734b of this title at home or abroad, for present or future delivery, at such rates, at such times, and upon such terms and conditions as he may deem reasonable and most advantageous to the public interest.'' (June 19, 1934, c. 674, Sec. 4, 48 Stat. 1178.)

2.

EACH OF THE APPELLANTS PERFORMED WORK, LABOR AND SERVICE FOR EIGHT HOURS DURING EACH SHIFT AND WHATEVER TIME APPELLANTS TOOK FOR EATING THEIR LUNCHES WAS IN CLOSE PROXIMITY TO THEIR WORK WHERE THEY COULD OBSERVE THE MACHINERY AND EQUIPMENT AND THE FLOW OF ORE OR PULP AND WERE RESPONSIBLE FOR THE PROPER PERFORMANCE OF THEIR WORK AND CONTINUOUS OPERATION OF THE MILL AND THE APPELLEE SUFFERED AND PERMITTED APPELLANTS TO RENDER SUCH SERVICES AND WITHOUT COMPENSATION FOR ONE HOUR PRIOR TO APRIL 22, 1941, AND 48 MINUTES FOR THE BALL-MILL MEN AND 49 MINUTES FOR THE SOLUTION MEN AFTER SAID DATE AND UNTIL TERMINATION OF EMPLOYMENT.

There is some conflict between the evidence of the appellants and witnesses for the appellee in regard to the time taken by the men in eating their lunches and as to the place and time of doing so. It seems that the place and time of eating lunches was left entirely to the men themselves and without any direction or restraint by the management other than what was contained in the Notices dated December 29, 1939, and April 23, 1941 (Rec. 64 and 67). It appears that the management reposed confidence in the men to eat their lunches at such times and places as would not interfere with or cause neglect of their duties.

Some of the evidence of the appellants and witnesses for the appellee are hereafter quoted from the transcript of the testimony as being typical and illustrative of the routine practice of the mill men in the employ of the appellee.

Mr. Fox, in his direct testimony, testified as follows (Rec. 55-57):

Q. Did it make any difference in the time which you took for lunch?

A. No.

Q. Was there ever any time during the course of your employment when you were able to take an hour away from your work?

A. No. (Rec. 56)

Q. Was there any time during the course of your employment that you were able to take 45 minutes away from your work?

A. Not and do justice to your work.

Q. Was there any time during the course of your employment that you were able to take a half hour away from your attention to your work while in the employ of the company?

A. Well, I would say not.

Q. Was there any time that you could take any time away from attention to your work?

A. No. You had to have your mind on the mill all the time.

Q. Where did you eat your lunch generally?

A. Most of the time in the mill.

Q. And that was in close proximity to your work, wasn't it?

A. Yes. It was, you might say, in the middle of it.

Q. Did that interfere with your mill work in any way?

A. Eating lunch?

Q. Yes.

A. Well, at times something would come up that would have to be attended to and you would quit, if you were eating lunch, you would quit eating lunch and go and attend to whatever it was.

Q. Was it possible for you to be parked any distance from the mill during any period of the eight hour shift and give your attention to the mill?

A. No.

Q. Was your attention to your work services continuous during the entire eight hour period?

A. It was, from the time you come on shift and relieve the other shift ahead of you, you were responsible for your work in the mill for the full eight hours.

Mr. Childers testified as follows (Rec. 105-106):

Q. Did you ever have any definite period off for lunch on any shift?

A. No.

Q. How did you eat your lunch?

A. Well, I usually had it where I could see most of the mill.

Q. How much time would you take?

A. Well, I never timed myself; I couldn't tell you just exactly. It doesn't take me very long to eat.

Q. Were you ever interrupted from eating your lunch?

A. Yes.

Q. How often would you say?

A. Several times. I coudn't tell the number of times.

Q. Was it a practice for one man to relieve the other man in operation of a shift?

A. No.

Warren S. Morden also testified in substance (Rec. 125-127):

Q. When would you eat your lunch on the day shift?

A. Well, that would vary. You see, when I first went to work there, everything was in pretty much of a turmoil, new mill just starting off and things were upside down, quite a number of things had to be ironed out, and we ate lunch when we got time. Lots of times we didn't get time to eat lunch at all. My partner went without lunch a number of times but I generally got a sandwich. That was when we first started, trying to get lime up and put in a ton of lime a shift or possibly more, and had to slack this lime and pack it up in the buckets and take care of the mill operation too.

Q. How long did you work on day shift; that is, how much time did you put in the mill on day shift?

A. You mean my average working time on shift?

Q. Yes.

A. Well, I was generally on my toes the full shift. I wouldn't say that I was always in a hurry after the mill was organized and running half way properly. There was more leisure time afterwards, but on the start we were on our toes, you might say, from the time we went on until the time we went off.

Q. When would you eat your lunch on the afternoon shift?

A. Well, most any time.

Q. Where would you eat it?

A. Well, I generally ate my lunch right alongside the classifier up by the mill.

Q. And on the graveyard shift, when did you eat your lunch?

A. Well, I ate that generally after I made my first round.

Q. Was there any time during your employment there that you took an hour for lunch or an hour for yourself?

A. No.

Q. Was there any time that you took three-quarters of an hour for lunch or for yourself?

A. Well, there might have been times when it would be three-quarters of an hour before I completed my lunch.

Q. Was that all taken up in eating of your lunch?

A. No sir. It was interrupted by some adjustment to be made or something to be attended to.

Q. Was there any time during your employment that you took as much as half an hour wholly for eating of your lunch?

A. No, it generally took me around 15 to 20 minutes to eat my lunch.

Q. Were you in a place where you could observe your work and what was going on during that time that you were eating your lunch?

A. Yes, I generally eat where I could observe the operation.

Q. How many hours did you put in during the afternoon shift on the solution or ball-mill?

A. You mean actual time working?

Q. Yes.

A. Well, it would be eight hours.

Q. And on the graveyard shift?

A. The same.

The evidence of the witnesses for the appellee is very vague and indefinite as to the time taken by the

various appellants for the eating of their lunches. Mr. Dobson, the manager and a witness for the appellee, estimates the time variously from about half an hour to longer periods but admits that he only went out to the mill two or three times a week, arriving there slightly before the lunch period and spending only from 45 minutes to two hours in the mill and that he did not visit the mill during the afternoon or graveyard shifts and hence his knowledge of the time taken by the men for lunch or for any other period would not be for any definite or constant period.

Upon cross-examination, a portion of his testimony is as follows (Rec. 164):

> Q. You testified you observed several of these men taking approximately half an hour for lunch. Will you state what they did with the other half hour during the same hour?
>
> A. Well, I can't recall what they did. I don't know whether they attended to their duties or talked or what they did. I presume they probably looked after some of their duties part of the time.

Again, Mr. Dobson testified in answer to a question by the Court (Rec. 167):

> Q. During the hours that they were supposed to be employed, were they supposed to be on duty during those hours at all times, unless some special reason called them away?
>
> A. They were supposed to be on duty, yes.

The testimoy of Mr. Clawson, Superintendent of the mill, and a witness for the appellee, was also very uncertain as to the time taken by appellants in eating their lunches. He testified on his direct examination relative to the practice of Mr. Fox in eating lunch partially as follows (Rec. 193):

Q. Do you know what Mr. Fox's practice was in eating lunch?

A. His practice generally was that he ate lunch either outside the little office or inside on the bench I used for my records.

Q. Do you know how much time he consumed in eating lunch?

A. I couldn't say positively how much time he used.

Q. What was Mr. Sutton's practice in regard to lunch? (Rec. 195, 196.)

A. Mr. Sutton's practice in regard to lunch, Mr. Sutton was a very very attentive man to his mill. The fact is, the man seldom spoke. He didn't trust practically anybody to do his work. I think that included Mr. Fox as well as the other helpers.

Q. What was his practice with regard to lunch?

A. Well, his practice was to eat his lunch on the steps leading from the primary thickener floor or office floor up to the agitators, that was his general rule. Sometimes he did eat in the little office.

Q. About how long did he consume as a lunch period?

A. I would say he took anywhere from 15 to 20 minutes.

Q. And what did he do at the end of his lunch period?

A. As a rule Mr. Sutton always got up and began to move around. What he done absolutely I couldn't say because——

The reporter evidently did not get the remainder of the sentence.

Mr. Clawson also testified in regard to the practice of Merrill C. Hutchins (Rec. 199):

Q. And Merrill C. Hutchins, what was his practice?

A. Merrill C. Hutchins, I can't say I ever saw him out of the mill when he took his noon hour off. He sat around. The time was to be taken when most convenient for them; it was left up to them.

Q. How long did Mr. Hutchins consume eating lunch?

A. I would say actually eating his lunch probably 15 to 20 minutes.

The testimony of Mr. Clawson, the mill superintendent, relative to the time taken by the other plaintiffs in eating their lunches and what they did afterwards was more or less to the same effect, that they probably took from 15 to 20 minutes and sometimes more and that they would sometimes sit around for an additional period of time.

Mr. Clawson also testified in his cross-examination (Rec. 212):

Q. And isn't it customary for all mill men to get paid for eight hour shifts, including the time they take out for lunch?

A. Up until the time of the wage and hour act, but almost all mills are working less than eight hours now.

Q. The wage and hour law has had considerable effect in changing the practice of employment of men, has it not?

A. It has.

Q. And particularly in cutting down overtime hours, isn't that correct?

A. Well, yes, it does cut down overtime in this particular respect—if you work them the straight hours, they naturally would be getting an hour every day overtime.

There is also testimony brought out from Mr. Clawson, the mill superintendent, on his cross-examination in support of the appellants' contention that they were in the employ of the appellee for eight-hour shifts (Rec. 214):

Q. Were most of the men within the mill for the eight hour periods of each shift?

A. They were in or around the mill, yes.

Q. And they were available, within call, if you needed them at any time?

A. I can't say to that because one man in particular, I hunted him over an hour and couldn't find him and we had a very small mill.

Q. Speaking about the mill men, were they not available to your call?

A. Most every man was within calling distance, yes. Outside of one or two men, practically

every man spent his time in the mill, even his leisure time.

Q. And they were in the mill even during what you call leisure time?

A. Yes, or there during most of it.

Q. And subject to your call or the foreman's, or anybody else's call who was there?

A. There was only one man in authority in that mill after I took charge and that was myself. I directed all the men myself.

Q. And you controlled the discipline of the mill?

A. That was my duties.

The appellee has attempted to show by its witnesses that the appellants spent a half hour or more in taking a shower and changing their clothes in the change-room, but which evidence is also very indefinite and there has been no showing on the part of the appellee that such time was to be deducted or could be deducted from appellants' wages or periods of employment. If the men took time to take a shower or change their clothes, it was during the latter part of their shift and before leaving their places of employment and hence could not be connected in any way with the lunch period for which time was deducted in the manner stated in the rules posted on December 29, 1939, and April 22, 1941.

If the manager and the superintendent knew of such practice, and had any objection to it, then they could easily have put a stop to that practice or discharged such employees if they were doing so on company time, for neglecting their duties.

The witnesses for the appellee have attempted to show that the appellants were in the habit of reading while on shift, but the time of reading seems to be spread over the entire eight-hour shift.

At least all three plaintiffs testified that they were required to take samples and make tests over the entire eight-hour shifts. The evidence, as a whole, shows that the work of a mill man, including both ball-mill man and solution man, is not laborious and with very little manual labor connected with it except on occasions and that during most of the time, with the exception of the routine of taking sample tests and so forth, that his duties consist of watching the mechanical contrivances and machinery and the flow of ore or pulp in order to see if anything goes wrong, and if it does, to correct it as soon as possible. This is shown rather positively by the evidence of Mr. Clawson, the mill superintendent, who testified in his cross-examination, in part as follows (Rec. 220):

Q. Doesn't the greatest part of the mill man's duty lie in observation and hearing?

A. A great per cent of it. That is, I wouldn't say a great per cent, I shouldn't say that—I would say one-third of it.

Q. Isn't the efficiency of the mill man determined a great deal by his ability to keep the mill running smoothly? (Rec. 221.)

A. Yes, sir.

Q. And if he does keep it running smoothly, he doesn't have to use his hands very much?

A. Not a great deal. As I testified, he doesn't spend a great deal of time, it can be done in as little as ten minutes.

Q. In other words, some mill men don't need to put in actual working time only a very small portion of their time?

A. There is a great deal of difference in the individual.

Q. And a mill man's sense of hearing goes a long way with a ball-mill man, does it not?

A. Sense of hearing and sight.

Q. And sight together?

A. Both.

Q. So that a mill man does not use his hands like a miner does?

A. No; mill men are really semi-skilled labor, or you might even call them skilled labor.

Q. And that is the principal part of the schedule, in keeping the mill operating as smoothly as he can?

A. Exactly, that is why they usually get more money.

Q. And very frequently in a mill there are things that go wrong very suddenly and very unexpectedly, isn't that true?

A. It can happen.

Q. And it does happen very often?

A. No, I wouldn't say very often. I would say very seldom.

Q. And on such occasions a man must act quickly and promptly in handling his work?

A. He should. They do not always do it.

Q. And for that reason a man generally keeps in close proximity to his work, so he can see or hear if anything goes wrong?

A. He should.

Q. And for that reason men are kept usually in the mill during the period of their eating lunch?

A. One man; I should say there should be one man in the plant.

3.

THERE IS EVIDENCE THAT THE APPELLANTS MADE CLAIM FOR OVERTIME PRIOR TO THE DEMAND MADE JUST BEFORE FILING OF ACTION: EVEN IF NO DEMAND WAS MADE THE APPELLEE WAS REQUIRED TO PAY FULL COMPENSATION UNDER THE ACT FOR ALL HOURS THE APPELLANTS WERE IN THE EMPLOY OF THE APPELLEE.

The conference between a committee of miners and millmen, upon which H. M. Childers, one of the appellants, represented the mill men, with Mr. Dobson, manager for the appellee, brought out the fact that the mill men were working eight hours a shift and being paid for only seven.

The work reports of the appellants will show that the appellants accounted for eight hours per shift and that the appellants followed the same routine for each of the eight hours. Such reports put the appellee on notice every day that the appellee was suffering, permitting, and accepting the services of the appellants for eight hours during each shift.

The notice to mill employees, dated April 22, 1941 (Rec. 64), did not seem to make any material difference in the working time of the mill men and only applies to a raise in wages of approximately 25 cents per day, or $1.50 per week. It may be noted, however, in this connection, that at the time a committee of the miners and Mr. Childers, representing the mill men, had a conference with Mr. Dobson, the manager, Mr. Childers brought up the subject of the mill men working eight hours and being only paid for seven hours and also the "Fair Labor Standards Act of 1938" but Mr. Childers was unable to give the sub-

stance of the reply of the manager, but he did testify in part as follows (Rec. 98-99):

Q. At that conference, was there anything mentioned about a seven hour day or seven hour shift?

A. Yes.

Q. What was it?

A. I mentioned the fact that we were working out there eight hours.

Q. And to whom?

A. Mr. Dobson.

Q. What was his reply, if any?

A. I can't remember the exact reply, but as I remember it, he gave me a lot of figures on how the mill wasn't making any money and that they would have to shut down if they had to pay the raise.

Q. Was there anything said at that time about fair wages standard act?

A. Yes; I can't recollect what it was.

Mr. Dobson, the manager, failed to contradict Mr. Childers' testimony in respect to the above matter and failed to give any explanation as to just what was said in regard to the point made by Mr. Childers that the mill men were not being paid their full time.

4.

THE CONCLUSIONS OF LAW FILED AND JUDGMENT ENTERED BY THE TRIAL COURT ARE NOT SUPPORTED BY THE LAW AND THE EVIDENCE; BUT ON THE CONTRARY THE TRIAL COURT SHOULD HAVE ARRIVED AT CONCLUSIONS OF LAW THAT APPELLANTS AND APPELLEE WERE ENGAGED IN COMMERCE AND PRODUCING GOODS FOR COMMERCE AND THAT APPELLANTS WERE IN THE EMPLOY OF THE APPELLEE FOR EIGHT HOURS DURING EACH SHIFT AND ENTITLED TO COMPENSATION FOR ADDITIONAL TIME.

There is considerable conflict in the evidence as to the manner and reasons for making out time cards and the inconsistency of the hours marked on the time cards and the actual time which the appellants claim to have given their services during an eight-hour shift. The testimony of Mr. Childers is typical of the practice in respect to making out their time cards at the end of a shift (Rec. 102):

> Q. When you went to work in the mill there, how did you make your time card out as to the number of hours?
>
> A. I marked seven hours.
>
> Q. Why?
>
> A. That was my instructions.
>
> Q. From whom?
>
> A. From the solution man I worked with. When I went to work in the mill I worked in with a man by the name of O'Neill. He gave me the rules I had to observe and one of them was to mark seven hours on my time card.

Mr. Dobson, the general manager, was the only one present at the trial who could have contradicted Mr. Childers or corrected him as to the reason for

the change in marking time cards and he failed to do so.

Prior to the commencement of the operation of the mill, the appellee, on December 29, 1939, posted a notice in the mill designated "Attention Mill Men" and which is defendant's Exhibit B (Rec. 67), the first three paragraphs of which read as follows:

> 1. The solution man on shift will be in charge of the mill and will be responsible for same.
>
> 2. Men will work seven hour shifts, relieving each other one hour for lunch. For example: the ball-mill operator will relieve the solution man from 11:00 to 12:00 and the solution man will relieve the ball-mill man from 12:00 to 1:00. The operator relieving will be responsible for the other operator's work as well as his own. This applies except in the case of emergency, when other relieving hours can be arranged.
>
> 3. Time cards will be filled out for each man on shift and signed by the solution man. He will then turn them into the mill office.

The designation of the time for relieving one of the men on shift by the other is somewhat ambiguous. It might indicate that the lunch period between 11 o'clock and 12 o'clock might apply only to the day shift or it might be simply illustrative for the three shifts but, inasmuch as the graveyard shift was from 11 p. m. to 7 a. m., then it must be apparent that the appellee expected the time and services of the appellants for the entire eight hours. If such was not the intention of the appellee then the appellants on the

graveyard shift should not have been required to report for work until one hour later when the appellants could have the benefit of that one-hour period before reporting for work.

After the conference of the committee of miners and mill men with the management on April 22, 1941, a notice was posted dated April 23, 1941, defendant's Exhibit A (Rec. 64), entitled "Notice to Mill Employees on Daily Wage Basis," wherein the solution men were notified that their shift, including the lunch period, would be eight hours as it always had been but instead of taking one hour for lunch they were to take forty-nine minutes but to mark their cards seven hours plus eleven minutes overtime which would result in an increase of $1.50 per week.

The ball-mill men were similarly instructed with one minute difference in the time worked and resulting in the same increase of $1.50 per week.

The testimony of the appellants testifying was that there was no change made in their working time or routine and their only benefit was an increase in their wages amounting to $1.50 per week.

There is no evidence in the record that the appellee insisted upon or even required a compliance with the above notices in respect to one man relieving the other or taking of a specific time for lunch.

The appellee posted the notices but suffered and permitted the men to devote their time and services for the entire eight hours and acquiesced and consented to the men eating their lunches when they

desired or their work afforded them an opportunity to do so.

The work report cards turned in by the appellants shows that the appellants were responsible for every hour of the eight-hour shift including the time they might spend in eating their lunches.

In the very recent case of *Walling v. Dunbar Transfer and Storage Company, Inc.,* a District Court case, Western District of Tennessee, reported in 6 Wage and Hour Reports 476 (at this writing not reported in Advance Sheets), the trial Court found that the officials of the transfer and storage company had given employees instructions that when they were on assignments they were responsible for defendant's trucks and their cargoes and that they were not to stop or leave the trucks for personal purposes. In some instances, men having their lunches with them ate while delivering or waiting at a customer's place of business and in other instances employees had no lunches nor took any time off for lunch but nevertheless were docked on some occasions for thirty minutes for lunch and on other occasions for one hour, depending on the length of the assignment. The trial Court in its Conclusions of Law expresses the views of the writer more explicitly and which reads as follows:

> "IV. The hours for which employees must be compensated at the standards prescribed in the Act include not only the hours that employees were actually engaged in specific assignments,

but also such hours as they are permitted by their employer to remain on or near their employer's premises subject to call. Therefore, defendant's drivers and helpers should have been compensated for the time spent in waiting about the premises for an assignment, as well as time spent in traveling from defendant's place of business to freight terminals and waiting for an opportunity to load defendant's trucks. Failure of defendant to show on its records such time spent by its employees resulted in violations of Sections 11(c) and 15(a) (5) of the Act and failure to compensate them for such hours resulted in violations of Sections 6 and 15(a) (2) of the Act.

V. Defendant's failure to compensate its employees for lunch periods when they were on duty during such periods resulted in violations of Sections 6 and 15(a) (2) of the Act (Sections 206, 215(a) (2) 29 U.S.C.A.) and its failure to show on its records such time spent by employees resulted in violations of Sections 11(c) and 15(a) (5) of said Act. It is immaterial that in some instances employees have eaten their lunches while driving, riding, or waiting for an opportunity to load or unload defendant's trucks.

We realize that there is considerable diversity in the operation of different industries and the most of which are carried on during the day time when the hours of work can be arranged to provide for a lunch period by the complete stoppage of work while all the employees eat at the same time.

It is much different in other industries which must operate for twenty-four hours per day without interruption. Such are quartz mills, reduction works, smelters, steel mills, oil drilling, railroading, shipping, and many others. In the mining industry it is generally necessary to suspend mining operations while the miners eat their lunches as their labor generally consists in working with their hands, while in the mills, smelters, and other reduction works, the processes are generally mechanical or chemical and must be watched continuously.

Oil well drilling is very similar to operating an ore mill inasmuch as the drilling is continued for twenty-four hours a day, which is usually divided into three shifts of eight hours each and the greater part of the time the drill is operating, the men stand around watching the operation and can generally tell from observation and feeling the cable whether or not the drilling is proceeding properly.

> "For the purpose of determining overtime compensation due to oil pumpers of defendant in accordance with the Act, there should be included as hours worked by such pumpers not only the hours that such pumpers were actually engaged in manual labor, but also such hours as they were charged by the terms of the understanding between them and the defendant with substantial responsibility for the successful operating of the pumps under their charge; and including also the periods during which they were obliged to remain on or near the premises to enable them to carry such responsibility properly." Fleming v. Rex Oil and Gas Co., 43 Fed. Supp. 950, 951;

Missouri K. & T. Ry. Co. v. United States, 231 U. S. 112, 34 S. Ct. 26, 58 L. Ed. 144.

The District Court for the Western District of Kentucky has construed the minimum wage section of the Act to include time when employee was required to be on the job was just as much "employment" as actual labor.

> "In determining amount of wages motorbus driver was entitled to under the Fair Labor Standards Act, the waiting periods between trips should be included in the total number of hours driver was employed, where driver was expected to be on the job during such periods which were not long enough to permit him to go elsewhere or to engage in other activities." *Travis v. Ray,* 41 Fed.Supp. 6.

The appellee evidently relies to a great extent upon the appellants taking advantage of the company's time in loafing with their lunch boxes open, reading on shift and taking showers before the shift was ended but in that respect, we must contend that the employees were, at all times, under the control of the mill superintendent and such practices, if indulged in, could have been restricted or prohibited.

> "It is pointed out that an essential characteristic of the relationship of employer and employee is that the former retains the right to control and direct the individual who performs the services, both as to the results to be accomplished by the work, and as to the details and means by which that result is accomplished. Undoubtedly, this proposition generally is sound and sustained by the authorities." *Carroll v. Social Security Board,* 128 Fed. (2d) 876, 878.

The notices posted in the mill attempting to regulate the hours of employment and periods of unemployment, even if agreed upon or acquiesced in by the appellants, if in contravention of the Act, did not discharge or release the appellee from its obligation to pay the appellants for the full time they were in the employ of the appellee within the meaning of the Act, for the reason that Congress has declared the Fair Labor Standards Act to be for the public benefit and the courts, by numerous decisions, have declared that the employer and employee may not, by any agreement, evasion or subterfuge, avoid compliance with the Act.

Even if the appellants were willing to waive any rights which they might have under the Act or if the appellee made some arrangement whereby the appellee secured services from the appellants and they acquiesced in such an arrangement, that the same would not be binding.

> "Overtime pay probably will not solve all problems of overtime work, but Congress may properly use it to lessen the irritations. Substandard labor conditions were deemed by Congress to be 'injurious to the commerce and to the states from and to which the commerce flows'. To protect that commerce from the consequences of production of goods under sub-standard conditions it may choose means reasonably adapted to these ends, including regulation of intra-state activities, by minimum wage and maximum hour requirements."
>
> "If overtime pay may have this effect upon commerce, private transactions made before or after

the passage of legislation regulating overtime can not take the overtime transactions 'from the reach of dominant constitutional power.' "

"If, in the judgment of Congress, time and a half for overtime has a substantial effect on these conditions it lies with Congress' power to use it to promote the employees' well-being".

Overnight Transport v. Missel, 316 U. S. 572, 86 L. Ed. 1682, 1687, 126 F. (2d) 98.

The failure of the appellants to demand pay for the hour deducted is not a waiver of their legal rights under the provisions of the Act.

"Defendants concede that an agreement, in advance of employment, to accept less than permitted by law would render nugatory the objectives of the Act. We think precisely the same result would follow if the employer, by agreement with its employees, be permitted to pay less than the Act prescribes. Waivers in advance of employment are no different in substance or effect than waiver of back pay for past employment. In both situations, the employers pay and the employees receive less than the statutory requirements and the purposes of the legislation ignored."

U. S. v. Warshawsky, 123 Fed. (2d) 622, 626.

Even if the appellee arranged the hours of work in such a way as to circumvent the purposes of the Act, the appellee would not be permitted to take any advantage of the appellants in that respect.

"Here the right asserted by the Board is not one arising upon or derived from the contracts be-

> tween the petitioner and its employees. The Board asserts a public right invested in it as a public body charged in the public interest with the duty of preventing unfair labor practices. The public right and the duty extend not only to the prevention of unfair labor practices by the employer in the future but to the prevention of his enjoyment of any advantage which he has gained by violation of the Act, whether it be a company union or an unlawful contract with employees as a means of defeating the statutory policy and purpose. Obviously, employers can not set at naught the National Labor Relations Act by inducing their workmen to agree not to demand performance of the duties which interposes or by insisting more than in a private litigation that the employers' obedience to the Act can not be compelled in the absence of the workers who have thus renounced their rights." *National Licorice Company v. N.L.R.B.,* 309 U.S. 350, 364; 84 L. Ed. 799, 810.

The marking of the time cards, or the acceptance of checks as payment for less hours than what the appellants were entitled to would not be regarded as satisfaction and full compensation under the Act.

> "Indorsement of checks acknowledging payment in full of all wages, by laborers performing work for city contractors, did not constitute accord and satisfaction so as to preclude laborers from suing contractors for balance of wages where wage rate was set by city ordinance and public policy of municipality was involved." *Gabel v. Elliott,* 35 Pac. (2d) 44.

CONCLUSION.

There is no question or conflict in the evidence that the mill operated twenty-four hours per day which was divided into three shifts of eight hours each and that each of the appellants were upon the appellee's premises for eight hours during each shift. If one of the appellants was relieved one hour for lunch, then the appellee was dispensing with the services of six men for one hour or a total of six man hours during each twenty-four hour day.

If such an arrangement was economical and satisfactory, then it is obvious that the mill could have been operated just as economically and satisfactorily by one man per shift for the entire twenty-four hour day.

We assume that the tonnage of ore through the mill and the saving of the values were practically the same for each hour of the day and therefore, it is obvious that the appellee was unnecessarily paying for wages for eighteen man hours per day, or else, was securing the services of the appellants for six hours per day without compensation.

The overtime wages for eleven and twelve minutes per day were for the purpose of increasing the wages $1.50 per week, which was received by the appellants and included in the computation of wages which we claim were earned and unpaid.

Dated, Reno, Nevada,
October 6, 1943.

MARTIN J. SCANLAN,
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